APPELLATE DEFENDER COMMISSION

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Resolution of the Appellate Defender Commission

Unanimously resolved by the Appellate Defender Commission to oppose the proposed amendments to Rule 7.212(B) of the Michigan Court Rules.

Since the enactment of 1978 Public Act 620, the Appellate Defender Commission has been charged with the "development of a system of indigent appellate defense services, which shall include services provided by the office of the state appellate defender , provided for under section 3, and locally appointed private counsel." MCL 780.712(4). Historically, the Appellate Defender Commission, through the Michigan Appellate Assigned Counsel System (MAACS) and State Appellate Defender Office (SADO), has furnished legal counsel for some 90% of all criminal appeals in the quarter century since its creation.

In 1992, the number of assigned appeals reached a high of 6,400; this year the number has ebbed to an expected 3,500. The vast bulk of these 3500 current appeals will be handled by approximately 160 private bar members operating under the aegis of MAACS and 18 staff attorneys at SADO.

The constant goal of the Commission has been to improve the quality of indigent appellate defense services in fulfillment of the state's obligations under the Sixth and Fourteenth Amendments and Const 1963, art 1, §20, and to do so with the highest standards of efficiency and cost-effectiveness. The statutory obligations of MAACS have been made more difficult by woefully inadequate fees, which are determined on a circuit by circuit basis, at levels generally far below those paid to county prosecutors or to attorneys in the classified civil service working for the Prosecuting Attorneys Appellate Service. Whenever state budgets are tight, those served by the Commission, who lack popular support, public sympathy, paid lobbyists, and who have been generally disenfranchised by virtue of criminal convictions, are an easy target for funding reductions.

While MAACS has made tremendous progress in bringing order and purpose to the process of qualifying and retaining the private attorneys necessary to its operations, as well as supporting

the attorneys and matching the attorneys to the cases, MAACS has been unable to reach its potential because there is no way to match the dramatic funding shifts which often rise and fall contrapuntally in comparison with caseloads.

To develop and maintain a proper roster of qualified appellate counsel for criminal cases with a high level of currency *vis á vis* caselaw developments requires that attorneys handle criminal appeals on a regular and consistent basis. The Court of Appeals, which developed these proposed rules without the involvement or support of any recognizable segment of the practicing bar, itself has repeatedly commented that the most stable part of the appellate workload is that undertaken by appellate specialists.

Over the past twenty-five years, the time for filing briefs has dramatically shrunk from a virtual unlimited availability of extensions of time to the current situation which allows to the parties one stipulation of 28 days and one extension of time on motion of 28 days. Because most time limits on appeal are not triggered by the parties but rather by those beyond their control, e.g., court reporters, oral argument, remands under MCR 7.211(C)(1)(d), for attorneys with economically viable caseloads to have any chance at balancing due dates requires that stipulations and extensions be available. If time is so constricted that maneuvering is impossible, then caseloads will have to be reduced to allow for the possibility that either the case an attorney is now briefing might require additional time or that any of the numerous other cases pending in an appellate attorney's workload might require unforeseeable but nonetheless immediate work.

For the private bar, this would mean taking fewer assignments and would make it difficult to maintain a private practice specializing in appeals. For SADO staff lawyers and MAACS roster attorneys, this would mean handling far fewer trial appeals per attorney and a dramatic increase in attorney costs. Finally, for any assigned lawyer, the Court of Appeals has already made the decision that it will issue costs personal to the attorney and then remove the attorney and assign new counsel if the timing deadlines are not met. For both SADO and MAACS attorneys, the economic risks of accepting such representation promise to outweigh any remuneration that might be expected, or to cause such proceeds to prove insufficient in an economy driven by monetary incentives.

The proposed rule will impose rigid and unrealistically short timelines at the expense of quality as well as causing human resource problems, all so that the parties can "hurry up and wait" while the briefs sit in the Court of Appeals' "warehouse" for six months. The single-minded focus on overall time to disposition has caused the Court of Appeals to lose sight of the unintended and unfair consequences such changes will cause in relation to other court rules, such as the need to investigate all issues as part of the direct appeal (a function of MCR 7.208, and MCR 6.508 that issues which could have been but were not brought in the initial appeal cannot later be raised in "post appeal" motions for relief from judgment) a burden that does not exist in any other jurisdiction but which dramatically impacts the work appellate counsel must perform during the time period in which the brief on appeal of right is due.

In sum, the Appellate Defender Commission opposes the proposed rules because it

- Will adversely affect the Commission's ability to fulfill its statutory mandate to develop and maintain an acceptable level of indigent criminal appellate defense services;
- Will unreasonably, and for no valid purpose, reduce the time for conducting the effective investigation necessitated by the limitations on subsequent post-conviction relief imposed by MCR 6.508;
- Will transfer costs back to counties from SADO, potentially creating Headlee Amendment violations, or require additional State resources unlikely to be forthcoming in the immediate future.

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